

CX – 14



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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OFFICE OF
ENVIRONMENTAL REVIEW
AND ASSESSMENT

April 6, 2017

MEMORANDUM

FROM: Tracy Peak and Heather Dean, R10 Aquatic Resources Unit

TO: Endre Szalay, R10 Office of Regional Counsel
Tara Martich, R10 Office of Compliance and Enforcement

SUBJECT: Jurisdictional status of the South Fork Clearwater River, pertaining to Clean Water Act administrative enforcement cases regarding unauthorized discharge from a suction dredge without a 402 permit.

This memorandum is being provided at the request of EPA Region 10's Office of Regional Counsel and Office of Compliance and Enforcement and addresses whether the upper reach of the South Fork of the Clearwater River, where the subject unauthorized activities occurred, is jurisdictional under the Clean Water Act (CWA; see Figure 1, next page). Administrative complaints have been filed against two individuals who, in 2015, operated a suction dredge in the South Fork Clearwater River without National Pollutant Discharge Elimination System permit coverage under Section 402 of the CWA.

EPA's regulations implementing the CWA define jurisdictional waters or "waters of the U.S." (WOTUS).¹ Together with the U.S. Army Corps of Engineers, EPA also issued guidance on WOTUS in 2008 (Guidance).² As described below, the South Fork Clearwater River is a WOTUS.

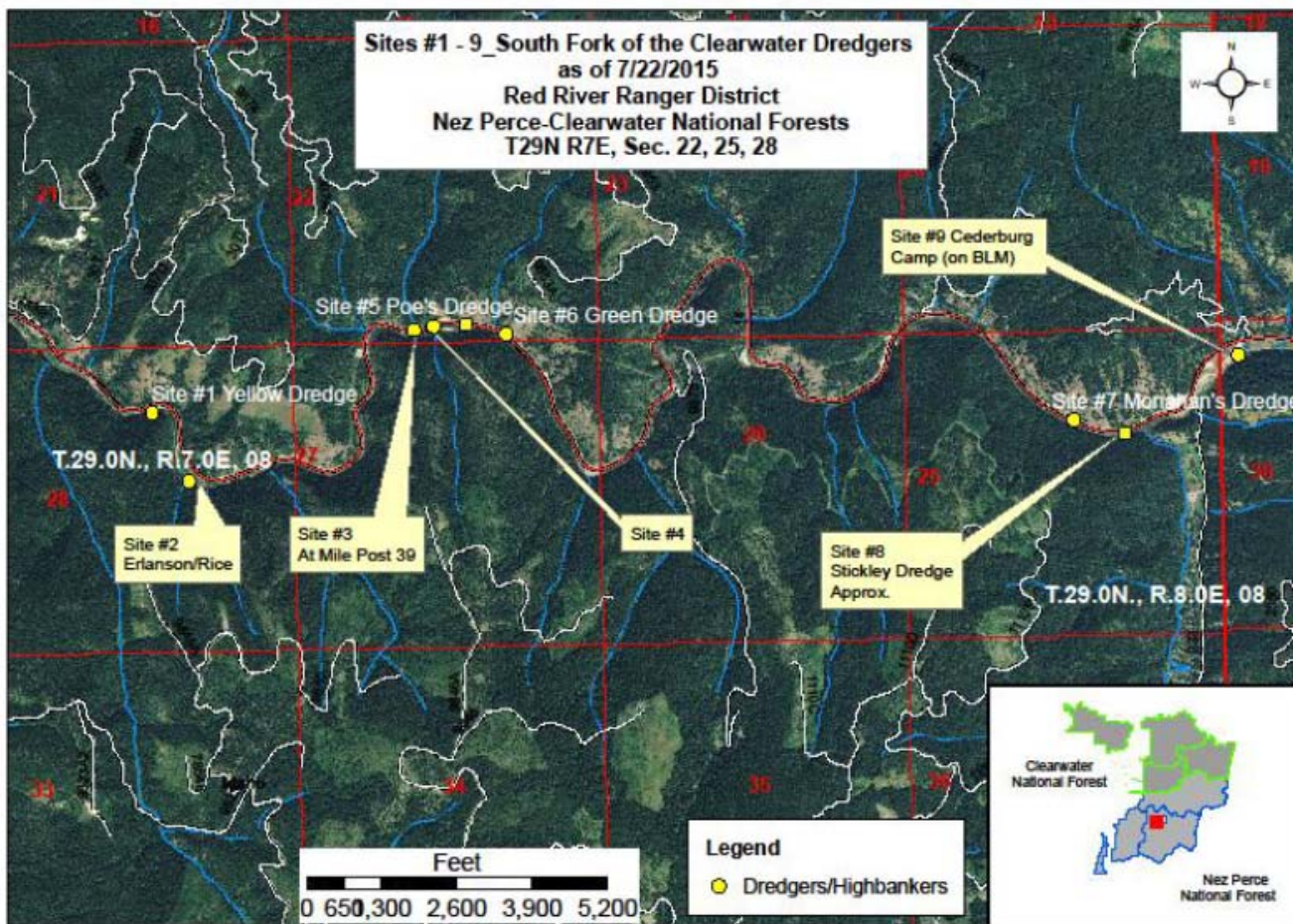
Under the regulations and consistent with the Guidance, EPA asserts jurisdiction over traditional navigable waters (TNWs) and certain non-navigable tributaries of TNWs. Such tributaries must be relatively permanent, flowing year-round or having continuous flow at least seasonally or, if they have less than seasonal flow, must have a significant nexus to the physical, chemical, or biological integrity of a TNW. The regulations define TNWs as, "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (40 CFR 230.3(s)(1)). The Guidance clarifies that waters are

¹ "Waters of the U.S." are defined at 40 CFR 230.3(s). On August 28, 2015, the Clean Water Rule revising the definition of "waters of the U.S." became effective. The Clean Water Rule has been challenged in both US District Courts and US Circuit Courts of Appeals. As of February 22, 2016, the Sixth Circuit Court of Appeals held that it has jurisdiction over the cases and stayed implementation of the Clean Water Rule nationwide until the Court rules on the merits of the challenges. As of the date of this memorandum, the previous regulations continue to apply to CWA jurisdictional determinations.

² Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (<https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents>).

TNWs if any of the following criteria are met:

1. They are subject to Section 9 or 10 of the Rivers and Harbors Act, or
2. A federal court has determined that the water body is navigable-in-fact under federal law, or
3. They are waters currently being used for commercial navigation, including commercial waterborne recreation (e.g., boat rentals, guided fishing trips, water ski tournaments, etc.), or
4. They have historically been used for commercial navigation, including commercial water-borne recreation; or
5. They are susceptible to being used in the future for commercial navigation, including commercial water-borne recreation.



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July 29, 2015, Clint Hughes

Figure 1. Locations of unauthorized suction dredging on the upper reach of the South Fork Clearwater River.

South Fork Clearwater River

The South Fork Clearwater River originates just southwest of Elk City, ID—where the American and Red Rivers converge—and flows for 63.8 miles³ before joining the Middle Fork Clearwater River at

³ Source: http://www.blm.gov/id/st/en/visit_and_play/things_to_do/rivers/rivers/clearwater_.html.

Kooskia, ID, to form the Clearwater River, a Section 10 water and tributary of the Snake River.⁴ The Snake River is also a Section 10 water and a tributary, of the Columbia River, another Section 10 water, which empties into the Pacific Ocean. As documented by a U.S. Geological Survey (USGS) stream gage located between Sites 8 and 9, within this reach (see Figure 1), the South Fork Clearwater River flows year-round (see Figure 2) and, therefore, is a relatively permanent tributary of the mainstem Clearwater River, a TNW.

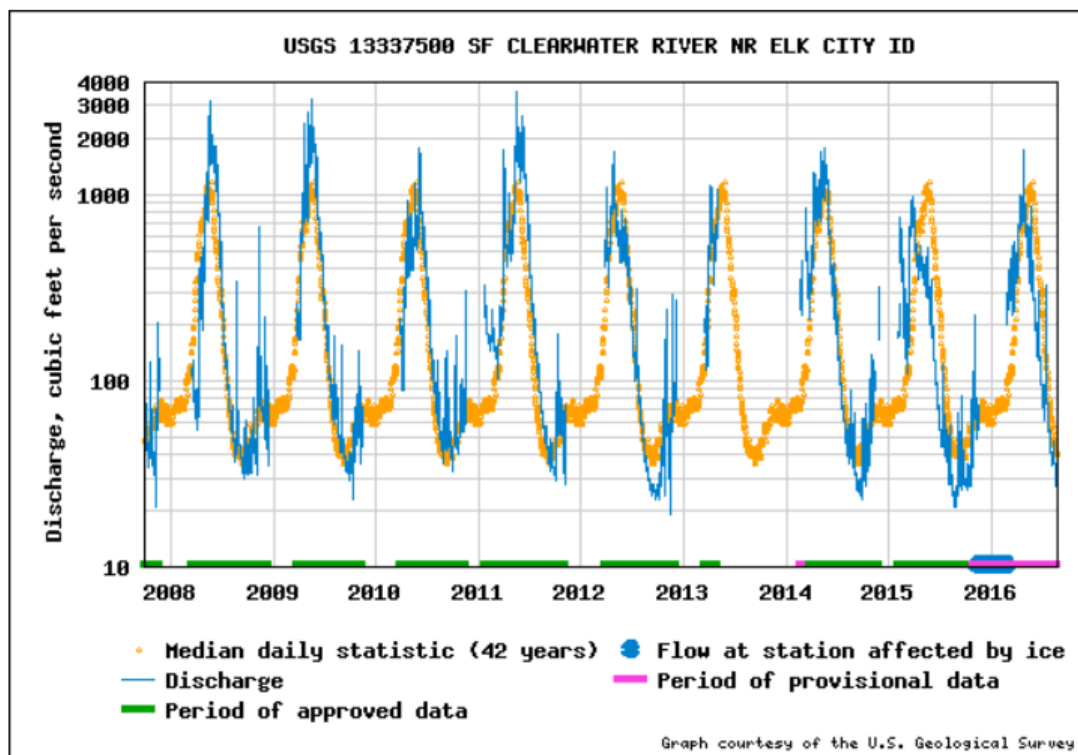


Figure 2. Stream Discharge, USGS Gage #13337500, South Fork Clearwater River, near Elk City, October 1, 2007 through August 22, 2016.⁵

In addition, the lower 44 to 45 miles of the South Fork of the Clearwater is also a TNW because it is used for commercial navigation, in the form of commercial waterborne recreation, namely kayaking and rafting, with online guides that link to vacation and travel planning sites and reveal use by travelers from other states.⁶ A landmark known as Hanging Rock, located just upstream of river mile 44, appears to be

⁴ The South Fork Clearwater is subject to Section 10 of the Rivers and Harbors Act from the confluence with the Snake River upstream to River Mile 40.5 (mouth of North Fork Clearwater River). Source: <http://www.nwww.usace.army.mil/Business-With-Us/Regulatory-Division/Section-10-Waters/>.

⁵ Source: http://nwis.waterdata.usgs.gov/id/nwis/uv/?cb_00060=on&format=gif_stats&site_no=13337500&period=&begin_date=2007-10-01&end_date=2016-08-22.

⁶ Sources: <http://montanaeddyhop.blogspot.com/2008/06/s-fk-clearwater-idaho-golden-canyon.html>; <http://www.mountainbuzz.com/forums/f16/lost-paddle-south-fork-clearwater-id-30237.html>; <https://vimeo.com/45478766>; http://www.allabouttrivers.com/rivers_in_Idaho/South_Fork_Clearwater_River_Idaho-RIV339.html; <http://www.americanwhitewater.org/content/River/detail/id/544>; <http://www.riverfacts.com/rivers/11028.html>; <http://www.whitewaterguidebook.com/idaho/>; https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwi_m72v3I3TAhUCPiYKHbOaBuEQFgggMAI&url=https%3A%2F%2Fwww.uidaho.edu%2F~%2Fmedia%2FUIIdaho-Responsive%2FFiles%2Fcurrent-

one of the most popular put-in spots, although there are also plenty of references to starting at Coyote Falls, about a mile further upstream.⁷ The South Fork Clearwater River is identified as Class II (novice) to V (expert) on the International Scale of River Difficulty.⁸

Idaho is known as the “Whitewater State”, offering residents and non-residents a variety of rafting and kayaking experiences. Whether one hires a guide, rents gear, or owns gear already, a range of fees are incurred. At a minimum, the Idaho Department of Parks and Recreation requires the display of a “Protection Against Invasive Species” sticker on both motorized and non-motorized vessels (except inflatable rafts or other inflatable vessels less than ten feet in length).⁹ These stickers cost \$7 for both residents and non-residents.¹⁰ In addition, boat rentals,¹¹ lodging opportunities,¹² and campgrounds¹³ are all available along or near the river, or in Boise or Moscow, which, respectively, are the locations of the state’s largest airport and the University of Idaho and are located three to five hours from the river. The University’s Outdoor Program both arranges and assists with trips to float the river.¹⁴ The river is also within a two- to five-hour drive from cities in Montana, Oregon, and Washington. Finally, although done primarily from the bank or while wading, fly-fishing is also a well-documented attraction drawing travelers to the South Fork Clearwater River.¹⁵

Lastly, because a portion of the South Fork Clearwater River flows through the Nez Perce Reservation (see Figure 3, next page), it can also be considered an interstate water (40 CFR 230.3(s)(2)) and thus a WOTUS.¹⁶ The Tribe generates revenue by selling fishing licenses in-lieu of a state license from the Idaho Department of Fish & Game. A Canadian fishing blog boasts about the fly-fishing on the segment of the river within the reservation and notes the \$25.00 license from required by the Tribe.¹⁷

Conclusion

The South Fork Clearwater River is a WOTUS on three accounts. First, because the South Fork Clearwater River flows year-round, it is a relatively permanent tributary of the main Clearwater River.

students%2Fcampus-recreation%2Foutdoor-program%2FTrail%2520Notes%2Fnorth-idaho-river-trips.ashx&usg=AFQjCNEBeggJ_FEqFJJQ4RQdYK3xJdl2A; and <http://www.kayakidaho.com/>.

⁷ River miles from USGS topographic map “Golden, ID, 1995.”

⁸ Sources: <http://www.americanwhitewater.org/content/River/detail/id/544/>; http://www.allaboutivers.com/rivers_in_Idaho/South_Fork_Clearwater_River_Idaho-RIV339.html; https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwi_m72v3I3TAhUCPiYKHbOaBuEQFggnMAI&url=https%3A%2F%2Fwww.uidaho.edu%2F~%2Fmedia%2FUIIdaho-Responsive%2FFiles%2Fcurrent-students%2Fcampus-recreation%2Foutdoor-program%2FTrail%2520Notes%2Fnorth-idaho-river-trips.ashx&usg=AFQjCNEBeggJ_FEqFJJQ4RQdYK3xJdl2A; and https://www.americanwhitewater.org/content/Wiki/safety:start#vi._international_scale_of_river_difficulty.

⁹ Source: <https://adminrules.idaho.gov/rules/current/26/0134.pdf>.

¹⁰ Source: Idaho Department of Parks and Recreation, Invasive Species Sticker Assistance Line: 208-334-4197

¹¹ Sources: <http://www.idahoriversports.com/content.asp?cat=3>; <http://www.idahowhitewaterunltd.com/page/sales-rentals>; and <https://www.uidaho.edu/current-students/campus-recreation/outdoor-program/rental-center>.

¹² Sources: <http://elkcityidahorealestate.com/cabins/>; http://grangevilleidaho.com/chamber/member_directory/rentals_clytle_cabin.htm; and <http://www.southforkriverranch.com/fishing.htm>.

¹³ Sources: <http://idahocampgroundreview.com/southfork.html>; <http://idahocampgroundreview.com/castlecreek.html>; and <http://idahocampgroundreview.com/leggettscreek.html>.

¹⁴ Source: <https://www.uidaho.edu/.../UIIdaho.../north-idaho-river-trips.ashx>.

¹⁵ Source: <http://nwsportsmanmag.com/fishing/plan-b-for-b-runs/>.

¹⁶ Interstate waters are those that flow across, or form a part of, state boundaries (such as the boundary between the State of Idaho and the Nez Perce Reservation; Pub.L. 80-845, sec 10, 62 Stat. 1155, at 1161 (1948)).

¹⁷ Source: <http://social.thefishinhole.com/index.cfm?action=fishing-articles&articleId=243>

The Clearwater River is connected to the Pacific Ocean via other rivers and is regulated under Section 10 of the Rivers and Harbors Act beginning at the mouth of its North Fork down to the confluence with the Snake River. As such, the South Fork Clearwater River is a tributary of other WOTUS. In addition, the South Fork Clearwater River is a TNW because it has documented commercial waterborne recreation in the form of rafting and kayaking. Finally, since it crosses the boundary of Idaho as it flows into the Nez Perce Reservation, the South Fork Clearwater can also be considered an interstate water. For these reasons, this waterbody is jurisdictional under the CWA.

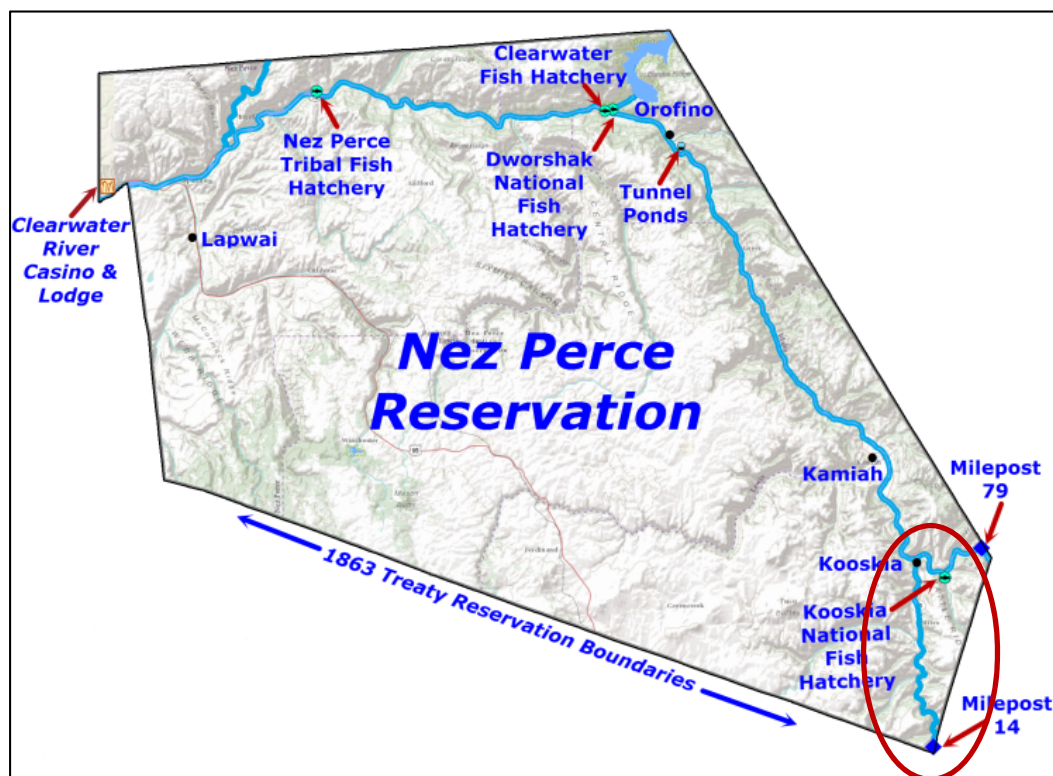


Figure 3. Map of Nez Perce Reservation with portion of South Fork Clearwater circled in red.¹⁸

¹⁸ State Highway 13 parallels the South Fork Clearwater River; Milepost 14 represents the upper limit of the South Fork Clearwater River within the Nez Perce Reservation. Similarly, U.S. Highway 12 parallels the mainstem Clearwater River and Middle Fork Clearwater; Milepost 79 represents the upper limit of the Middle Fork Clearwater River within the Nez Perce Reservation. Source: <http://www.nptfishpermits.com/>.